(2)

91-1972

No. _____

Supreme Court, U.S.
FILED
JUN 10 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

In the Matter of ADAM SPARKS,

Petitioner,

On Habeas Corpus.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER ADAM SPARKS

RONALD A. ZUMBRUN
JAMES S. BURLING
*R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED..... ii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT..... 4

ARGUMENT

I. A PROFOUND CONFLICT EXISTS AMONG THE JURISDICTIONS AS TO THE CONSTITUTIONALITY OF ENFORCING UNCONSTITUTIONAL ORDERS 4

II. CALIFORNIA COURTS MAY NOT ENFORCE CRIMINAL CONTEMPT PENALTIES STEMMING FROM THE VIOLATION OF AN UNCONSTITUTIONAL ORDINANCE 6

III. SAN FRANCISCO'S HOTEL ORDINANCE TRANSPARENTLY VIOLATES PETITIONER'S FUNDAMENTAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION..... 7

IV. BY FAILING TO APPLY THE CALIFORNIA RULE ALLOWING COLLATERAL ATTACK ON THE CONSTITUTIONALITY OF THE RESIDENTIAL HOTEL ORDINANCE, THE COURT BELOW IMPROPERLY FORCES PETITIONER TO UNDERGO CRIMINAL PENALTIES FOR FAILING TO ACQUIESCE IN THE VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS 10

CONCLUSION 11

TABLE OF AUTHORITIES CITED

Page

Cases

Bullock v. City and County of San Francisco, 221 Cal. App. 3d 1072 (1990) 9
Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897) 8
Corenevsky v. Superior Court of Imperial County, 36 Cal. 3d 307 (1984) 6
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 6
Ex Parte Purvis, 382 So. 2d 512 (Ala. 1980) 5
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 2
Hodel v. Irving, 481 U.S. 704 (1987) 2
In re Berry, 68 Cal. 2d 137 (1968) 5, 6, 7, 10, 11, 12
Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 2
Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 2, 8, 9, 12
Walker v. City of Birmingham, 388 U.S. 307 (1967) 3, 5, 6, 10, 11

Rules and Regulations

San Francisco Administrative Code, Chapter 41 3
Supreme Court Rule 37 1

United States Constitution

Fifth Amendment 2, 3, 7, 8, 9, 11
Fourteenth Amendment 2, 3, 7, 8, 11

No. _____

In The

Supreme Court of the United States

October Term, 1991

In the Matter of ADAM SPARKS,

Petitioner,

On Habeas Corpus.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER ADAM SPARKS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000

contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the landmark United States Supreme Court case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *Hodel v. Irving*, 481 U.S. 704 (1987), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

STATEMENT OF THE CASE

Petitioner, a small hotel operator, seeks federal habeas corpus relief from an order of the San Francisco County Superior Court sentencing him to jail for contempt. Petitioner faces imprisonment for failing to comply with injunctions issued pursuant to the San Francisco Hotel Anti-Conversion and Demolition Ordinance, San Francisco Administrative Code, Chapter 41. This ordinance forces petitioner to devote 69 rooms of his 84-room tourist hotel to sheltering homeless derelicts at drastically discounted rates—or alternatively, to ransom his property by making a cash payment to the City and County of San Francisco. On its face, this measure transparently comprises a regulatory taking of petitioner's property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The Federal District Court acknowledged the patent constitutional defects of the San Francisco hotel ordinance but dismissed the habeas corpus petition because of a misapplication of this Court's ruling in *Walker v. City of Birmingham*, 388 U.S. 307 (1967). In *Walker*, this Court upheld an Alabama rule barring defendants from challenging the validity of unconstitutional enactments as a defense to criminal contempt citations. However, this Court did not adopt the Alabama rule as a uniform standard, and California has expressly rejected the Alabama rule. By misapplying Alabama's procedural rule to a California defendant, the Federal District Court has added to the confusion surrounding these conflicting rules and deprived petitioner of fundamental constitutional safeguards.

SUMMARY OF ARGUMENT

Under California law, whether petitioner may rightfully be subjected to criminal contempt sanctions depends on the constitutional validity of San Francisco's Hotel Anti-Conversion and Demolition Ordinance. On its face, this ordinance comprises a transparent violation of the Takings Clause. The Federal District Court acknowledged this fact in considering petitioner's habeas corpus petition but failed to follow California law and declare that the state court lacked jurisdiction to hold petitioner in criminal contempt. Instead, the District Court applied a conflicting Alabama rule barring challenges to the constitutionality of directives as a defense to criminal contempt citations. This ruling, affirmed by the Ninth Circuit Court of Appeals, leaves petitioner in an unconscionable position: the state courts have refused to protect his federal constitutional rights, and the federal courts have failed to recognize petitioner's procedural rights under California law. Such an outcome is contrary to fundamental concepts of fairness and justice and will contribute to further confusion and conflicts among the jurisdictions.

ARGUMENT

I

A PROFOUND CONFLICT EXISTS AMONG THE JURISDICTIONS AS TO THE CONSTITUTIONALITY OF ENFORCING UNCONSTITUTIONAL ORDERS

The use of criminal contempt to enforce compliance or punish noncompliance with legitimate directives is an

indispensable feature of our judicial system. However, when the power of contempt is used in support of abusive and unconstitutional enactments, it becomes a tool of injustice. In such cases some rule is needed to prioritize the conflicting values of judicial authority and the sanctity of fundamental human rights.

The Constitution itself is silent as to whether the contempt power may properly be invoked to enforce compliance with unconstitutional mandates. In the absence of a uniform directive from this Court, two sharply conflicting rules have emerged from the various state and federal jurisdictions.

Several states, such as Alabama, employ a collateral bar rule under which the constitutional validity of an ordinance may not be challenged as a defense to criminal contempt sanctions arising from refusal to comply with the ordinance. This is true even when the measure is transparently unconstitutional and requires the irretrievable surrender of important constitutional rights. *Ex Parte Purvis*, 382 So. 2d 512 (Ala. 1980).

Contrary to this policy, California law provides that defendants appealing a criminal contempt citation may challenge the constitutional validity of the underlying directive. *In re Berry*, 68 Cal. 2d 137 (1968). Under the California rule, courts lack jurisdiction to issue injunctions enforcing unconstitutional directives, and "it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt." *Id.* at 147.

The Alabama collateral bar rule was upheld by this Court in *Walker v. Birmingham*, 388 U.S. 307, and the same

rule is applied in federal courts dealing with contempt actions arising from the violation of federal directives. When state contempt citations are reviewed by the federal judiciary, however, the rule of the individual state should govern. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

II

CALIFORNIA COURTS MAY NOT ENFORCE CRIMINAL CONTEMPT PENALTIES STEMMING FROM THE VIOLATION OF AN UNCONSTITUTIONAL ORDINANCE

In California, the rule is clear that no criminal sanctions may lawfully be enforced for violating an injunction if the underlying ordinance is unconstitutional. *In re Berry*, 68 Cal. 2d at 145. The validity of the injunction depends on the validity of the underlying enactment, which may be challenged via contempt proceedings. "[U]nder California law, a person may disobey an order and raise his defenses when he is sought to be held in contempt for such disobedience." *Corenevsky v. Superior Court of Imperial County*, 36 Cal. 3d 307, 327 (1984) (citing *Berry*).

Berry was decided *after Walker v. Birmingham* and embodies an express rejection of Alabama's collateral bar rule. The *Berry* rule was held to be "considerably more consistent with the exercise of [constitutional] freedoms than that adopted in Alabama, and it is therefore difficult to perceive how the *Walker* decision is of relevance." *In re*

Berry, 68 Cal. 2d at 150. This is a proper application of the general policy that states are free to afford their citizens *greater* constitutional safeguards than those guaranteed by the Federal Constitution, but may not fall *below* federal standards in protecting constitutional rights.

III

SAN FRANCISCO'S HOTEL ORDINANCE TRANSPARENTLY VIOLATES PETITIONER'S FUNDAMENTAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The ordinance at issue in this case prohibits petitioner from renting more than 15 rooms of his 84-room tourist hotel to tourists. The remaining 69 rooms must be devoted to what amounts to a public welfare program—housing derelict residents of San Francisco's Tenderloin District.

The ordinance not only fails to compensate petitioner for this confiscation of his private property, it requires petitioner to discount his normal room rates so drastically that his hotel would be forced into bankruptcy if he complied. The predatory nature of the regulation is most clearly revealed by a provision that excuses petitioner from complying with its terms if he agrees to pay a cash ransom to the City and County of San Francisco.

On its face, this measure comprises a transparent regulatory taking of petitioner's property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This fact was forcefully acknowledged by the Federal District

Court in which petitioner's habeas corpus action was filed. In those proceedings, the court described the subject ordinance as an "unconscionable and flagrantly unreasonable imposition"; a "heinous and egregiously horrid" measure that "runs afoul of the Takings Clause of the United States Constitution." Recorders Transcript at 62-65.

This is a completely accurate characterization of San Francisco's residential hotel ordinance, as can be confirmed by the briefest glance at this Court's regulatory takings doctrine.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This federal prohibition was extended to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

In its leading case on regulatory takings, this Court has required that heightened judicial scrutiny be applied to property regulations challenged under the Takings Clause. *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3.[1] Applying heightened scrutiny to the San

---

[1] Although California's First District Court of Appeal has had two opportunities to pass on the constitutionality of the residential hotel ordinance, it has refused to honor petitioner's right to heightened scrutiny under *Nollan*. When petitioner brought this question before that forum, the state panel swept aside petitioner's carefully reasoned constitutional arguments, reiterating its own policy of extreme deference to abusive (continued)

Francisco ordinance, it is clear that this measure was designed and enacted for the sole purpose of forcing a politically powerless minority to bear the full costs of providing a general public benefit. As such, the ordinance transparently violates the Takings Clause on its face.

The ordinance's avowed purpose of providing low-cost shelter for Tenderloin derelicts could no doubt be construed as a general public benefit to the City and County of San Francisco. But a general public benefit cannot, under the Fifth Amendment, be financed by holding the constitutional rights of hotel owners to ransom. The City and County of San Francisco has the authority, under its police power, to allocate its general revenues to subsidize any group it pleases. However, forcing one small group of property owners to bear the full costs of such a program is an affront to basic concepts of equity. This is a classic, indeed a prototype, violation of the Takings Clause, which "'bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 346 U.S. 40, 49 (1960)).

---

regulations: "In California there is an extensive body of precedent rejecting such claims [*i.e.*, federal takings claims invoking *Nollan*] and displaying a generally tolerant attitude to municipal ordinances in this area." *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072, 1089 (1990).

IV

BY FAILING TO APPLY THE CALIFORNIA RULE ALLOWING COLLATERAL ATTACK ON THE CONSTITUTIONALITY OF THE RESIDENTIAL HOTEL ORDINANCE, THE COURT BELOW IMPROPERLY FORCES PETITIONER TO UNDERGO CRIMINAL PENALTIES FOR FAILING TO ACQUIESCE IN THE VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS

The Federal District Court accurately described San Francisco's residential hotel ordinance as a "heinous and egregiously horrid" violation of the Takings Clause. Under California law, such a finding would mean that the Superior Court lacked jurisdiction to compel petitioner to comply with the ordinance, and the criminal contempt sanctions levied against petitioner are therefore without effect.

However, the District Court went astray in dismissing petitioner's habeas corpus petition on the grounds that "[t]he ruling of *Walker* indicates that a party may be held in contempt for violation of a court order even though the underlying order may be unconstitutional." *See* Recorder's Transcript.

In fact, *Walker* merely upholds the constitutionality of such a rule as applied in Alabama. This Court has never held that the Alabama rule approved in *Walker* has mandatory applicability in other jurisdictions. *See In re Berry*, 68 Cal. 2d at 150. Especially where—as in California—other states have expressly rejected the Alabama rule, it would be repugnant to the principles of federalism for federal courts to gratuitously impose Alabama's collateral

bar rule in reviewing state procedures arising in other jurisdictions.

By incorrectly applying the Alabama rule to a California proceeding, the court below deprives petitioner of an important procedural right enunciated by the California Supreme Court in *In re Berry*. At the same time, the court below acquiesces in the refusal of the California courts to uphold petitioner's federal constitutional rights. This condemns petitioner to the worst of all possible worlds—the state courts have refused to uphold his federal rights, and the federal courts have failed to recognize his rights as a California citizen. In addition to its manifest injustice, such an outcome can only add to the inter-jurisdictional confusion and conflict that exists in this area.

CONCLUSION

California courts have expressly rejected Alabama's collateral bar to challenging the validity of unconstitutional directives in criminal contempt proceedings. The California rule of *In re Berry* does not conflict with this Court's decision in *Walker v. Birmingham* but simply reflects a policy choice to extend greater constitutional protections to California citizens than Alabama courts extend to citizens of that state.

Ironically, in the case at bar California's state courts have refused to extend to petitioner fundamental constitutional protections guaranteed to all Americans by the Fifth and Fourteenth Amendments to the United States Constitution. The failure of California courts to apply this

Court's regulatory takings doctrine, set forth in *Nollan v. California Coastal Commission*, leaves petitioner facing imprisonment for failure to comply with a transparently unconstitutional ordinance.

In proceedings below, the Federal District Court acknowledged the transparent invalidity of the San Francisco hotel regulation but mistakenly applied Alabama's collateral bar rule to dismiss petitioner's habeas corpus action. The District Court should have applied California's *Berry* rule, which would put at issue the constitutionality of the subject hotel ordinance.

Allowing petitioner to be jailed as a result of a misapplication of conflicting procedural rules would work an unconscionable miscarriage of justice and contribute to further confusion among the conflicting jurisdictions. Accordingly, Pacific Legal Foundation respectfully urges this Court to grant the writ of certiorari for the purpose of remanding this case to the Federal District Court to determine the constitutional validity of the challenged regulation.

DATED: June, 1992.

Respectfully submitted,

RONALD A. ZUMBRUN
JAMES S. BURLING
*R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation